

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
	)	
Applicant,	)	
	)	
v.	)	Case No.: 16-CV-622-GKF-PJC
	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 627,	)	
	)	
	)	
Respondent.	)	

**RESPONDENT'S BRIEF ON ISSUES RAISED BY COURT**

COMES NOW Respondent, IUOE, Local 627, pursuant to this court's order [Dkt. No. 8], and addresses the issues of whether there is an ongoing proceeding or investigation and whether efforts to enforce the judgment are "proceedings or investigation" within the meaning of 26 U.S.C. § 161(1), and would show the court as follows:

1. The subpoena power of the Board as set forth in 29 U.S.C. § 161, which is the authority here at issue, refers to matters brought pursuant to 29 U.S.C. §§ 159 and 160, as the introductory clause of § 161 declares. It is § 160 that is applicable here, as the matters herein relate to Unfair Labor Practices, (ULPs), rather than representation or elections as set forth in § 159.
2. 29 U.S.C. § 160 is fairly general in terms of procedure. Rather, by regulation, the Board has set out specific ULP procedures. 29 CFR § 101.1

*et seq.* As previously noted, even though the ULP process is adjudicatory rather than regulatory, the procedures differ from standard judicial proceedings in one important respect: an entire process is followed to determine liability, which then becomes final; then another entire process is followed to determine amounts due; “entire process” meaning hearing before an ALJ, appeal to the Board, review by the Tenth Circuit, certiorari to the U.S. Supreme Court, with intermediate remands and reviews, to finality.

3. 29 CFR §§ 101.2 through 101.9 refer to bringing a charge, an investigation to determine whether a complaint should be filed from the charge, and a formal proceeding instituted, etc. §§ 101.10 through 101.15 deal with the proceedings of determining liability on a complaint. Then, after that process is completed, the backpay side of the matter is pursued, as set forth in 29 CFR § 101.16. Those proceedings are instituted by the Regional Director either issuing a notice of hearing before the ALJ, with or without a “backpay specification”, at which point the proceedings then follow that set forth in §§ 101.10 to 101.14, inclusive.
4. Thus, the Regional Director’s investigation stage as set forth in § 101.4 is not reinvoked at the backpay determination level; that stage ended with a dismissal or a complaint. See §§ 101.6 and 101.8. Rather, the proceedings stage is reimplicated beginning with § 101.10. This is where

the current case would stand, assuming that the Regional Director had scheduled a hearing before an ALJ, either with or without the issuance of a “backpay specification”.

5. However, in this case the Regional Director has not issued a notice of hearing before an ALJ, nor has there been a “backpay specification” (nor apparently any decision not to pursue one). Indeed, the Regional Director is not even involved in the process of the subject subpoena. See document 1-2, p. 55 of 84.
6. In summary, under the NLRB’s statutory/regulations framework, the court may enforce a subpoena under 29 U.S.C. § 161(1) where there are proceedings or investigation. At the current level of this case, any investigation process has been completed. The case awaits the invocation of the proceedings level—the Regional Director’s issuance of a notice of hearing before an ALJ. The subpoena would be to the “designated place of hearing” under 29 U.S.C § 161(1).
7. It is significant that Applicant does no analysis of either § 161 or the applicable regulations. Rather, it cites to cases which, similarly, do not do analysis of the statutory/regulatory framework of the NLRB. For example, it cites to *NLRB v. Steinerfilm, Inc.*, 702 F2d 14 (1<sup>st</sup> Cir. 1983), which held that discovery at the circuit level was inappropriate. The remainder is dictum. That dictum does not address the NLRB’s statutory/regulatory

framework, but cites to a Supreme Court case dealing with a different agency, which is given different statutory and regulatory powers. Further, none of the cases cited by the Applicant in its most recent brief is precedential; those cases lose their persuasive value by failing to offer appropriately supported analysis. *U.S. v. Martinez-Cruz*, 836 F3d 12305 (10<sup>th</sup> Cir. 2016). Further, where the authorities relied on do not address the issues now raised, they can hardly be considered persuasive in determining those issues.

8. In conclusion, because the Regional Director is not involved in the subpoena herein, the investigation period has passed, and “backpay” proceedings have not been invoked, the subpoena herein does not fall within the phrase “proceedings or investigation” within the meaning of 29 U.S.C. § 161(1), the subpoena was not issued in connection with ongoing proceedings or investigation, and the General Counsel’s office is without power in this matter; it is the Regional Director who has the regulatory authority, not the General Counsel, to proceed forward, set a hearing, and subpoena thereto. Applicant’s authorities do not address the statutory/regulatory framework of the NLRB or are inapposite and are neither persuasive nor determinative here.

For the foregoing reasons, as well as those set forth in the response filed herein [Dkt. No. 7], Respondent prays that the subpoena be quashed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on 4 November 2016, a true, correct, and exact copy of the foregoing document was served via electronic notice by the CM/ECF filing system to all parties on their list of parties to be served in effect this date.

By: **s/Steven R. Hickman**  
Steven R. Hickman